RELIEF FOR THE SUPREME COURT.

BY EX-JUSTICE STRONG.

AMONG the many subjects now reasonably deserving consideration from Congress, there can be no one which more imperiously demands early action than the present condition and the necessity for relief of the Supreme Court of the United States. Great public and private interests emphasize the demand. The court was created by the Constitution and placed at the head of one of the three divisions of this government to maintain the just powers of each, as also to protect the rights of the States, and particularly and avowedly "to establish justice." Plainly it was never contemplated that at any time it should be allowed to become incapable of performing the functions assigned to it. If embarrassments should intervene, or obstacles to the efficient working of the court should arise, the Constitution conferred power upon another branch of the government to remove them, and the grant of that power carried with it the obligation to use it whenever it became necessary.

Now, what are the facts? For more than seventy years next following the adoption of the Constitution the court was able to discharge promptly all the duties imposed upon it. No suitor was unreasonably delayed, and the legal business of the government was never embarrassed by any inability of the court to give it early attention. During all that period the court needed no relief. Not until after 1860 did the number of cases brought into the court exceed an average of about seventy in a year. Not until after that year was the court unable to dispose of all pending cases within a term comparatively brief. There was, it is true, from year to year a gradual increase of the court's business, especially after 1850, and the length of the term during which the court sat was prolonged correspondingly, in order to accommodate this enlargement. Still, until 1860 the number of cases brought into the court was never so great as to be beyond the

power of the court to dispose of them all. Even in 1858 the number of cases on the docket at the beginning of the term was only 261; in 1859 the number was 309; in 1860 it was 278, and in 1861 it was 265. Thenceforward there was an immense increase from year to year, doubtless owing, in large measure, to the Civil War, to the reconstruction measures, to the amendments of the Constitution, and to the establishment of the Court of Claims. This increase has continued steadily down to the present time, though questions arising out of the war, reconstruction, and the amended Constitution have been largely settled. There is now every reason to believe that the future will exhibit a steady increase over the present and past.

The figures of past growth are worthy of note. In 1880, at the close of the second week of the term of the court, the number of cases set for argument was 1,069.

In 1881 the number at the same period of the term was	1,113	In 1885 it was	1,177
In 1882 it was	1,110	In 1886 it was	1,251
In 1883 it was	1,169	In 1887 it was	1,277
In 1884 it was	1,174	In 1888 it was	1,408
		In 1889 it was	1,478

It is not meant that all these cases had been brought into the court during the next preceding year. In each year a large part of them were *remanets*—cases which the court had been unable to dispose of at former terms, although the terms had been lengthened to seven months. Even in 1880 the calendar or argument list had become so large that a case could not be heard and decided within less than about three years from the time when it was brought into the court. The evil is much greater now. This overloading the court, and the consequent injury to suitors and to the government, have for many years attracted public attention and called loudly for relief. But nothing has hitherto been accomplished by Congress, from which alone relief can come.

The court cannot relieve itself. As already remarked, its sessions are now about seven months in length, and so they have been many years. With the extremest industry it is impossible to dispose of more than about four hundred cases in any one year. Long experience has demonstrated that. It will require nearly four years to clear the present calendar, and if it were now clear, the next calendar would in all probability be beyond the power of the court to dispose of in due season. From three to four years must elapse before a case now brought into the court can be reached for decis-

ion, and in view of past experience, and of the amazing growth of the country, of its wealth and business, of the multitude of startling inventions, of the increase of railroads, and the prospective increase of commerce, it is not unreasonable to anticipate that, if relief does not come, the burdens under which the court is now struggling will grow larger from year to year. Is the present condition of things establishing justice? Is it not, rather, a practical denial of justice? Has a suitor no just cause of complaint against a government avowedly organized "to establish justice" between itself and its constituents, and among its individual subjects, when he must wait three or four years before he can obtain it?

The evils of a continuance of such a state of things are too many, and too great to be patiently endured. Beyond the wrong to those who have just rights which they seek to enforce, there exists a temptation to persons in the wrong to remove cases from the lower courts into the Supreme Court solely for delay. The general public also suffers. Among the cases long delayed, there are always some, and often many, which raise questions in which the business of the country is interested—questions which, so long as they remain unsettled, paralyze industry and enterprise.

I have said the court cannot relieve itself. Relief must come from some other quarter, and it can come from no other than Congress. The Constitution manifestly intends that Congress shall from time to time make all needful provision for the administration of justice. While it cannot create a Supreme Court (that having been done by the Constitution itself, and no power having been given to create another), it is empowered to establish inferior courts wherever it may deem them either needful or useful, and it may assign to them such jurisdiction as the public interest may require, excepting only in cases over which the Supreme Court has original jurisdiction. Congress has power given to it by the Constitution expressly to except from the appellate jurisdiction of the Supreme Court such cases as it may deem wise to except from it. Moreover, the Constitution gives to Congress the power to make all laws which shall be necessary and proper for carrying into execution all powers vested by that instrument in any department or officer of the government. Can it be denied that the possession of such authority carries with it a duty? If

any officer of the government, or if the Supreme Court, becomes unable to execute efficiently and usefully a power vested in him or it (that is, the power of his office), is it not incumbent upon Congress to provide by law what is necessary and proper for the execution of that power?

It is needless to pursue this subject further. I cannot think the power and duty of Congress to provide some remedy for the embarrassed condition of the Supreme Court, some relief for the present inadequate administration of justice, are doubted by any one. Nor can I think there is any difficulty in finding a complete remedy for the existing evil. The late Mr. Justice Davis, long a member of the court, and familiar with its burdened condition before 1880, when its burden was much less than it is now, prepared and submitted to the Senate a bill, which, in his judgment, and in the judgment of the other members of the court, and, I think, of the legal profession very largely, if not generally, would, if enacted into law, have efficiently and permanently relieved the court, and at the same time would facilitate the administration of justice in all the circuit courts of the country. No doubt it would have been an adequate remedy. A different proposition also was submitted by Mr. Manning, of Mississippi, in the House of Representatives on the 26th of January, 1880, and referred to the Judiciary Committee, from which it was never reported. Neither measure was ever moved farther, and Congress has hitherto remained silent, I had almost said indifferent.

Yet the bill prepared by Mr. Justice Davis undoubtedly exhibits a plan for an arrangement that would effect all that is needful. And it furnishes, I think, the only possible adequate remedy for the existing evil. It proposes the establishment of a court of appeals in each of the circuits into which the country is now divided—a court intermediate between the Supreme Court and the circuit courts. It is obvious that the details of such a plan may be various, but they all should contemplate vesting in the intermediate courts a large part of the appellate jurisdiction now belonging to the Supreme Court. To what extent this appellate jurisdiction may be taken from the Supreme Court and given to the courts of appeals may admit of differences of opinion. That Congress may determine. The courts of appeals should be courts of error alone, and their decisions should be final in most

cases. They may be, and they probably should be, constituted either of the Supreme-Court justices assigned to the circuit and two or three circuit judges, with, perhaps, one or more district judges; or constituted of circuit judges alone; or of circuit judges associated with one or more district judges. In regard to the extent of the jurisdiction to be given to the courts of appeal there may also be differences of opinion. Of course the Supreme Court must retain all the original jurisdiction conferred upon it by the Constitution. That Congress cannot take away. So it may be, or it may not be, wise to leave for that court immediate appellate jurisdiction of all cases in law or in equity in which there are questions arising under the Constitution or laws or treaties of the United States. Perhaps the same may be said of revenue and patent cases, appeals from the Court of Claims, and cases in the territorial courts.

But there is a vast body of other cases in which no questions arise under the Constitution, laws, or treaties of the United States—cases which may be excepted from the appellate jurisdiction of the Supreme Court without danger to the correct and intelligent administration of justice. This is true of most cases which come within the jurisdiction of United States courts because of diverse citizenship of the parties. If these, with perhaps some others, were not removable into the Supreme Court for review, there can be no doubt that the court would find permanent relief and be able to dispose of all its business within a reasonable time. Certainly this would be the case after the present accumulation shall have been worked off. Unfortunately, that will occupy several years, and therefore a temporary continuance of the present evil may be unavoidable. But present evils may be endured if alleviated by an assurance of early-coming relief.

The suggested establishment of intermediate courts of appeals contemplates that in all cases of which appellate jurisdiction is given to them, appeals from the circuit courts shall be taken only to them, and that writs of error may be sent to the circuit courts only from the courts of appeals. It is also a necessary part of the scheme that judgments of the courts of appeals shall be reviewable by the Supreme Court only when the amount in controversy shall exceed a fixed sum, say ten thousand dollars, or when the case presents a question arising

under the Constitution or laws or treaties of the United States (if jurisdiction of such cases be given to the courts of appeals), or when the court shall certify that the case raises a legal question of sufficient general or public importance to require its final determination by the Supreme Court, or when a writ of error or an appeal shall be specially allowed by a justice of the Supreme Court.

I forbear entering more fully into the details of the proposed plan. They may safely be left to the wisdom of Congress. But of the wisdom of this plan itself I think there will be little doubt. Its purpose and its effect, if adopted, are to sift out of the very large appellate jurisdiction of the Supreme Court large classes of cases that now encumber and, indeed, overwhelm the docket of that court, and commit them to the final disposition of another court of errors. It is impossible to see how suitors can be injured by it, or how the public can suffer. The Supreme Court will continue to be, as now, the final interpreter of the Constitution, laws, and treaties of the United States, and the protector of all rights held under them, while the judgments of the courts of appeals will be final in a vast number of cases. And in many cases, no doubt, where those judgments would admit of another review, they will be acquiesced in and allowed by suitors to become final. Nor would any suitor suffer injustice. He would have in a lower court a trial, and a review in a court of errors, as now, if dissatisfied. That is all which is allowed to suitors in the State courts.

It is, I think, worthy of consideration that the establishment of intermediate courts of appeals, as proposed, is not an untried experiment. The highest courts of some of the States have been greatly embarrassed by the accumulation of business upon their dockets, and relief has been sought in various ways. In one State at least, if not in more, relief has been sought and obtained by the establishment of intermediate courts of appeals. I refer to Illinois. In that State appeals to the Supreme Court directly, and writs of error from it, are allowed in all criminal cases, in cases involving a franchise or freehold, and in all cases involving the validity of a statute. But all other appellate jurisdiction is invested primarily in intermediate courts of appeals, and their jurisdiction is final in all cases where the amount in controversy is below one thousand dollars. Cases involving a

greater sum may be removed from the courts of appeals to the Supreme Court by writs of error or by appeal, and so may cases involving a smaller sum by special allowance. The arrangement is, in substance, the same as that proposed for the national Supreme Court by Mr. Justice Davis's bill. The system has been in existence nearly twenty years, and I am informed by the highest authority that it has worked admirably. The result has been that the Supreme Court of that State has been completely relieved, although it was about three years behind when the courts of appeals were established. It soon caught up, and since the institution of the intermediate courts it has not had on its docket more than half the number of cases it would otherwise have had. I am assured also that many cases which could under the law go to the Supreme Court stop at the decision of the appellate court. I may add that the intermediate courts are constituted of circuit-court judges. Beyond doubt an arrangement similarly formulated by Congress would bring speedy and permanent relief to the Supreme Court of the United States.

It must be admitted that the plan contemplates and requires a moderate increase of the judicial force of the government. It requires an addition to the number of circuit judges now in commission. But the addition is needed if no new courts be established. The present circuit judges cannot do all that is needed in their circuits, and the business is steadily increasing. It is now many times greater than it was in 1869, when the last addition was made to the judicial force of the government. That was the only considerable addition that had been made within more than fifty years, though the population of the country had more than quadrupled and the business of the country more than correspondingly increased. Many of the circuits are now too large, and the admission of new States has added to the embarrassment. And what of the future ? Can it be doubted that, with the rapid development of the country, with the wonderful advance in population, wealth, production, invention, and consequent litigation, the courts will be still more burdened, and, if justice be not denied, more courts and more judges will be indispensable ? Is it not enough that in the past the judicial force of the country has not kept pace with the country's development ? Shall the future witness a greater lack ?

I have heard it suggested that, instead of intermediate courts

holding their sessions in each circuit, it might be wiser to institute only one, to sit in Washington, but sending its writs to all the circuit courts, and receiving appeals from thence. I spend no time upon this beyond saying that such an arrangement would be far less convenient than the establishment of a court of appeals in each circuit, that the costs and expenses to parties would be much greater, and that the circuits would lose much, if not all, of the advantages of the presence and work of the new circuit judges at home.

I must not dismiss the subject without at least a brief notice of another plan for the relief of the Supreme Court which has been brought forward. It is the one mainly embodied in the bill introduced by Mr. Manning, to which I have heretofore referred. It proposes a large addition to the membership of the Supreme Court; a division of that court into two or three sections; a distribution of the cases on the docket among the several sections, and a hearing and decision of the cases assigned to it by each section. In regard to this it may be said that a decision by a section of the court could not fail to be received, alike by the parties and the public, with less confidence than is now given to the judgment of the entire court. This is no unimportant consideration. There are others more grave. If the decisions of a section are to be final, not subject to review and correction, then the section is practically an additional Supreme Court, which Congress has no power to create.

I know that some of the States, in order to relieve their highest courts, have organized an additional tribunal, coördinate and having equal powers. This it is conceded a State may do, for its legislature has all legislative power which is not withheld from it by the constitution of the State; but Congress has no legislative power which has not been expressly granted to it, or which is not necessarily implied by express grant. No such grant can be found in the Constitution of the United States, and if there be any implication, it is a denial of power to ordain and establish any other than inferior courts. Moreover, if, after a section has heard, examined, and reached its conclusions in a case it has had under consideration, it pronounces no judgment, but reports its conclusions to the entire court for judgment to be entered there, it is manifestly only an attempted evasion of the Constitution. So if the court is to reconsider the case before giving judgment, instead

of accelerating the disposition of its business, the plan must retard it. And in case there is to be no reconsideration this absurdity is involved: the court gives judgment in a case which it has never heard or considered. It is hardly to be expected that any conscientious judge will consent to that.

I will not prolong this discussion. In 1881 I wrote an article (published in the May number of THE NORTH AMERICAN REVIEW of that year) in which I much more fully expressed my views of the needs of the Supreme Court and of the remedies proposed for relief. I am unwilling now to repeat what I then said. My present object is only to invite renewed attention to the subject, and to express the hope that Congress will no longer delay devising and furnishing that relief to the court which the "establishment of justice" and the voice of the public imperatively demand.

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